LAU ING HUO

v.

PUBLIC PROSECUTOR

HIGH COURT, SIBU
DATO' HJ. ABDUL KADIR B. SULAIMAN J.
[CRIMINAL APPEAL NO. 11 OF 1990]
6 OCTOBER 1992

CRIMINAL PROCEDURE: Forgery of document - For cheating purpose conviction of appellant under s. 468 of Penal Code - Appeal against conviction and sentence - Counter-appeal by Public Prosecutor against inadequacy of sentence - Prosecution had admitted his earlier evidence as untruthful - His subsequent evidence contradictory - Learned Magistrate relied on earlier evidence to convict appellant - Whether Magistrate's reliance on the earlier evidence resulted in miscarriage of justice.

EVIDENCE: Section 114(g) Evidence Act 1950 - Defendant not calling material witnesses to support his case - Whether s. 114(g) may be invoked against the defendant.

The appellant was found guilty of under s. 468 of the Penal Code and convicted of forging a document for the purpose of cheating. He appealed against conviction and sentence. The appellant questioned the Magistrate's reliance on the evidence of the prosecution witness, PW1, who when recalled, confessed that his earlier evidence had been untruthful. The Magistrate relied on the earlier evidence to convict the appellant as he had come to the conclusion that PW1 had not lied earlier.

The learned Magistrate had also invoked the presumption under s. 114(g) of the Evidence Act 1950 against the appellant when he failed to call material witnesses to support his case.

The basis of the appeal were that:

(i) that the realiance by the learned Magistrate on the earlier evidence had resulted in the miscarriage of justice; and
(ii) that the invoking of s. 114(g) of the Evidence Act 1950 against the appellant was a misdirection.

Held:

[1] PW1 on his own volition had stated his earlier evidence to be untruthful. In fact he did not want the Court to believe his earlier evidence and instead wanted the Court to believe his subsequent evidence. It was the subsequent evidence that the learned Magistrate should have considered in the light of this evidence as a whole. The evidence must be scrutinised, the learned Magistrate had erred in his finding.

[2] There was no other independent evidence to the charge. Further, the prosecution had failed to identify the forger and therefore the appellant ought have been acquitted of the charge without his defence having been called.

[3] Section 114(g) of the Evidence Act 1950 never applied to the defence. The failure of an accused person to call any witness cannot be made the subject of comment at any criminal trial. The burden remains on the prosecution to prove the guilt of the accused beyond reasonable doubt. Therefore it was a gross error on the part of the learned Magistrate to have invoked the section against the appellant.

[Appeal allowed. Conviction quashed. Counter-appeal by public prosecutor against sentence dismissed.]

Cases referred to:
Mohamed Alias v. PP [1983] 2 MLJ 172 (dist)
Khoon Chye Hin v. PP [1961] MLJ 106 @ 107 (foll)
Mat v. PP [1963] MLJ 263 (refd)
Abu Bakar v. Regnia [1963] MLJ 288 (foll)

Legislation referred to:
Evidence Act 1950 s. 114(g)
Penal Code s. 468

For the appellant - Joseph Tang; M/s. Tang & Co.
For the respondent - Thomas Akin Jelimin, DPP

JUDGMENT

Hj. Abdul Kadir b. Sulaiman J:

This is an appeal by the Accused against the conviction and sentence imposed by the learned Magistrate and a counter appeal by the learned Deputy against the inadequacy of sentence, on the following charge:

> That you on 24th day of January 1984 or thereabout, sometime in the afternoon at the office of Lieng Seng Sdn. Bhd., Sarikei, Sarawak, forged a certain document, to wit an undertaking document ref: 25/LSSB/84 dated 24 January 1984, intending that it shall be used for the purpose of cheating and that you thereby committed an offence punishable under s. 468 of the Penal Code.

At the end of the trial in the Court below, he was found guilty on the charge and was convicted accordingly. Upon the conviction, he was sentenced to six months' imprisonment. It is against this finding and the sentence imposed that the parties are now appealing.

The basis of the appeal by the Accused against the conviction is that the learned Magistrate has misdirected himself on questions of the reception of evidence and the burden of proof on the defence in a criminal trial. This misdirection, it is contended, has resulted in the miscarriage of justice and, therefore, the conviction ought to be quashed.

On the question of the reception of evidence, it was submitted by the learned Counsel for the Appellant that heavy reliance had been placed by the learned magistrate on the evidence of PW1 which ought to have been ignored and by not doing so has resulted in the conviction of the Accused.

The Accused was charged for forging a document, Exh. P9, intending that it shall be used for the purpose of cheating, an offence under s. 468 of the Penal Code.

Exh. P9 contained, *inter alia*, a para as follows:

> I, Ooi Sheng Khoon, acting Sibu manager, on behalf of Yeo Hiap Seng Trading Sdn. Bhd., Sibu Branch, had received the exact payment of the above-mentioned of five hundred thirty thousand two hundred twenty three and eighty-five cents IN CASH from Lieng Seng Sdn. Bhd., Sarikei, that had been handed over to me today.

It is contained in a letter bearing the letterhead of Lieng Seng Sdn. Bhd. dated 24 January 1984 duly signed by the appellant for the said Lieng Seng Sdn. Bhd. and the said Ooi Sheng Khoon. It is not in dispute that the exhibit was signed by Ooi Sheng Khoon, PW2, but according to the witness, at the time he signed the letter, the above-quoted para was not in the letter and that he never received the amount stated therein. It is also not in dispute that the above-quoted para was not typed at the same time as the rest of its typewritten content but was subsequently added in. So, the issue here is, who could have typed the exhibit and also whether at the time when PW2 signed the exhibit, the above-quoted para was already in the letter.

The said letter is in English. According to the Appellant in his evidence, he was from a Chinese school. He does not know written English. He writes in Mandarin. Whenever he received letters in English he would ask his employee to read for him. He does not even know how to type. He does not have a typist working with him. According to him, Exh. P9 was typed by PW1. DW3, the younger brother of the appellant who was present at the material time in the office corroborated the evidence of the appellant that Exh. P9 was typed by PW1. There are other exhibits tendered in this case, such as Exh. P2 and Exh. P6. Both bear the letterhead of Lieng Seng. Apart from the figures, the contents are written in Chinese characters. PW2 confirms that Exh. P2, was written by the appellant in his presence. As regards Exh. P6, it was a letter of proposal for the methods of settlement of business debts by the appellant's company to PW2's company signed by the appellant and PW2 which was produced in the course of PW2 giving his evidence.

Next, we come to the evidence of PW1. In examination-in-chief he said that on 24 January 1984, the appellant showed him Exh. P9. At that time the exhibit did not contain any signature and the above-quoted para in it. In the evening of the following day, he was again shown the exhibit by the appellant, and this time he noticed that the above-quoted para and the signatures of the appellant and PW2 were already in it. He did not know who typed the document. In cross-examination, he confirmed what he said in the evidence in chief.

In re-examination he said he did not tell a lie in the court. All that he told was the truth. In the course of the hearing of this case, PW1 was recalled by the defence. He was confronted with a copy of an affidavit he had made three months after the alleged commission of the offence by the appellant and about three years before he gave his evidence in chief in court. He admitted to the making of the affidavit and now said that Exh. P9 was typed by him at the request of the appellant and PW2. He admitted that what he told the court in earlier proceeding before he was recalled, was not the truth. What he was telling now was the truth. His explanation for his lie was that he was earlier on pressured by the police.

According to his evidence, he typed Exh. P9 on 24 January 1984. The first time without the

above-quoted para and the second time, he inserted the said para into the exhibit. He saw cash on the table, and since cash payment was involved, he was asked to type the said para in. At the time he inserted the said para in, Exh. P9 was not signed by anyone yet. He saw the payment in cash being made by the appellant to PW2. The two versions of the evidence of PW1 remain part of the evidence in this case as his credit was not impeached by either the prosecution or the defence. On this aspect of the evidence of PW1, the learned Magistrate in his judgment at p. 165 of the record of appeal has this to say:

> I accept the evidence of PW1 more before he was recalled by the Defence Counsel for further cross-examination as I do not doubt that he was telling the truth then. I have observed his demeanour clearly and do not find him to be subject to any pressure from the police.

His authority for such a finding is the case of *Mohamed Alias v. PP* [1983] 2 MLJ 172. In that case Charles Ho J. said at p. 172:

> The fact that there are discrepancies in a witness' testimony does not straightaway make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept parts of the witness' evidence if it considers them to be true.

There was a number of discrepancies in the testimony of a witness in that case and because of this the learned trial magistrate regarded him as an unreliable witness. She, however, did not state whether she rejected the whole of the testimony given by the witness. She appeared to have relied on part of the evidence of this witness in her judgment. As for the decision in that case, I would concur with the statement of the law as stated. As early as 1961 in *Khoon Chye Hin v. PP* [1961] MLJ 106 @ 107, Thomson CJ said:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

However, in the present case under appeal, PW1 on his own volition when recalled told the court that what he had said earlier was not the truth and that what he was now saying was the truth. In that light there was nothing to scrutinise as regards his earlier evidence, that is, evidence before he was recalled. The Court should not take cognisance of what he said before he was recalled. In fact he did not want the Court to believe that part of his evidence. So in that light it is wrong for the learned Magistrate to give more weight to that part of the evidence. He was not telling the truth then. Whether or not he was subject to any pressure from the police is irrelevant. PW1 wanted instead for the court to believe his subsequent evidence.

It is to this part of the subsequent evidence that the learned Magistrate should give his consideration in the light of the evidence of this witness as a whole. It is different if PW1 were to say that both parts of his evidence contain the truth but in the circumstances there appeared to be contradictions. In the circumstances, the learned Magistrate has clearly erred in his finding. The evidence of PW1 must therefore be scrutinised with great care and suspicion.

The conviction of the appellant to be sustainable must, therefore, be supported by other evidence. There is no other independent evidence to support the charge that Exh. P9 was forged by the appellant. The other signatory to Exh. P9 is PW2 acknowledging the receipt of the sums stated therein to the tune of RM530,223.85. In his evidence he stated that when he signed the exhibit the acknowledgment portion was not there. He was merely promised by the appellant that he would settle the amount later after the cheque for the amount being signed by the appellant's father. Until the end he did not receive the stated amount.

So, if the evidence of PW2 is to be accepted, who could have forged Exh. P9 by inserting that provisions regarding the acknowledgment of the receipt of the stated amount by PW2? There is ample evidence to show that the appellant could not type and that he did not know English. This burden of identifying the forger remains with the prosecution. This, to my mind, the prosecution has failed to establish. On this ground alone, the defence of the appel-

lant ought not to have been called and the appellant ought to have been acquitted of the charge.

However, at the end of the case for the prosecution, the learned Magistrate called for the appellant to enter on his defence. In his evidence the appellant stated that the exhibit was typed by PW1. He admitted that the first and second paras were typed in first but before the exhibit was signed by him and PW2 the acknowledgment portion was typed in by PW1 at the request of PW2 and him. The amount of cash mentioned therein was handed by him to PW2 as the latter insisted that he should pay in cash. His brother DW3 was also present during the transaction. He obtained the cash from his parents, his brothers and from a cigarette company. DW3 corroborated the evidence of the appellant.

According to DW3, the exhibit P9 was typed by PW1 and during the second occasion the acknowledgment para was typed in and when this was done both the appellant and PW2 signed the exhibit. He saw the appellant take out cash of RM530,000 from the safe and he counted the money for them. The money was handed over to PW2 at the time PW1 was typing the exhibit.

The appellant, however, did not call his parents to give evidence on his behalf. The learned Magistrate in his decision had this to say:

> The Accused in this case has failed to give the evidence of his father and mother. No reasons were given by the Counsel why these 2 vital witnesses were not called. I therefore invoke s. 114(g) of the Evidence Act against them. Their evidence if produced shall be presumed to be unfavourable to the Accused.

This is a very serious misdirection by the learned Magistrate. In appropriate circumstances, the section may be invoked against the prosecution. But the section never applies to the defence for as stated by Winslow J. in *Abu Bakar v. Regina* [1963] MLJ 288 that it is clear from the authorities that there is no duty cast upon the defence in a criminal trial to call any evidence. The failure of an accused person to call any witness cannot be made the subject of comment at a criminal trial.

The burden remains throughout in the prosecution to prove the guilt of the accused beyond any reasonable doubt. For the accused to earn his acquittal, he merely on the balance of probability, needs to create a doubt as to the truth of the prosecution's case or as to his guilt. Even where the court does not accept or believe the Accused's explanation but nevertheless it raises in the mind of the court a reasonable doubt as to his guilt, he is still entitled to be acquitted. See *Mat v. PP* [1963] MLJ 263. So it is a gross error on the part of the learned Magistrate in this case to have expressly invoked the provisions of s. 114(g) of the Evidence Act on the appellant. For that misdirection, the conviction of the appellant must be quashed.

The learned Deputy for the respondent, while conceding that the learned magistrate has misdirected himself urged upon this court to order a retrial. I see no merit in it and I therefore allow the appeal by the appellant and quash the conviction. The appeal by the learned Deputy against the sentence is accordingly dismissed.